Lee Chee Meng v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05–155–90
HASHIM YEOP A SANI CJ (MALAYA), HARUN HASHIM AND GUNN CHIT TUAN SCJJ
27 JANUARY 1992

Criminal Law *— Dangerous drugs — Trafficking — Possession — Defence of no knowledge — Proof of exclusive use of room where drugs were found — Discrepancies in evidence as to weight and number of exhibits — Whether prosecution had established prima facie case — Dangerous Drugs Act 1952 ss 37(b), (d), (da), 39B(1)(a) & (2)*

Criminal Procedure *— Exhibits — Flaws in prosecution's evidence relating to exhibits — No evidence as to weight of drugs found in vanity case — Total weight of drugs found only 8.71g above statutory limit — Weight of drugs in vanity case belonging to second accused crucial to sustain charge against her — Dangerous Drugs Act 1952 s 37(da)(iiia)*

Criminal Procedure *— Chain of evidence — Dangerous drugs — No search list to assist prosecution — Discrepancies in the number of packets of drugs involved — Serious doubt as to identity of the exhibits — Prima facie case not established*

The appellant appealed against his conviction and sentence on a charge of trafficking in dangerous drugs under the Dangerous Drugs Act 1952 (the 'Act'). The appellant was found in a room in which a female person (the second accused) was also sleeping. A search was made in the room and packets of drugs were found, of which ten were found in a vanity case belonging to the second accused. The appellant at the trial denied knowledge of the drugs, and denied that he had exclusive use of the room since his other friends also frequented the room. [See [1991] 1 MLJ 226.]

Held, allowing the appeal:

(1) The totality of the evidence in this case did not support the conclusion of the learned trial judge that the appellant had exclusive use of the room. The burden on the appellant in this respect was merely to cast a reasonable doubt. Where the presumption under s 37(da) of the Act is invoked, the burden on the defence was only on the balance of probabilities. The doubt as to exclusive use of the room by the appellant alone could be sufficient ground to allow the appeal.

(2) There was a serious flaw in the prosecution case in the evidence relating to the exhibits. Firstly, no evidence was given as to the weight of the ten packets of drugs found in the second accused's vanity case. Since the total weight of the drugs in the charge was 23.71g, that is, only 8.71g above the statutory limit of s 37(da)(iiia) of the Act, the weight of the ten packets of drugs in the vanity case was crucial to sustain the charge against the appellant. Secondly, there were discrepancies in the witnesses' evidence as to the number of packets of drugs involved.

A (3) There was a serious doubt as to the identity of the exhibits in this case and therefore it could not be said that the prosecution had established a prima facie case under the charge.

[Bahasa Malaysia summary

B Di dalam kes ini perayu telah merayu terhadap sabitan dan hukumannya atas tuduhan mengedar dadah berbahaya. Perayu telah dijumpai di dalam sebuah bilik di dalam mana seorang perempuan (yang kemudiannya menjadi sidituduh kedua) sedang tidur. Penggeledahan telah dibuat dan dadah telah dijumpai di beberapa tempat dalam bilik
C itu termasuk tempat alat solek yang dipunyai oleh sidituduh kedua. Perayu di dalam perbicaraannya telah berkata dia tidak tahu mengenai dadah itu dan ia menafikan ia mempunyai penggunaan ekslusif bilik itu oleh kerana kawan-kawannya pun selalu datang ke bilik itu.

Diputuskan, membenarkan rayuan:

D (1) Dari keseluruhannya keterangan di dalam kes ini tidak ada sokongan bagi keputusan hakim yang arif bahawa perayu mempunyai milik ekslusif bilik itu. Beban yang dipikul oleh perayu di dalam perkara ini hanya menimbulkan keraguan yang munasabah. Di mana anggapan di bawah s 37(da) Akta Dadah Berbahaya
E 1952 digunakan, beban bagi pihak defendan ialah hanya atas pertimbangan kemungkinan.

(2) Terdapat cacatan yang serious di dalam kes bagi pihak pendakwa mengenai keterangan mengenai barang kes. Tidak ada keterangan diberi mengenai beratnya sepuluh bungkusan dadah di dalam tempat alat solek sidituduh kedua. Oleh kerana jumlah beratnya
F dadah yang disebut di dalam surat tuduhan ialah 23.71g yang hanya 8.71g atas batasan statutori di bawah s 37(da)(iiia) Akta itu, berat sepuluh bungkusan di dalam tempat alat solek itu adalah sangat penting untuk menyokong tuduhan terhadap perayu.

(3) Terdapat keraguan yang serius mengenai identiti barang kes di
G dalam kes ini dan tidaklah boleh dikatakan pendakwa telah membuktikan kes prima facie di bawah tuduhan itu.]

Notes

For cases on s 39B(1)(a) and (2) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed) paras 77–92. For cases on s 37(d) and
H (da) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed) paras 38–47.

Cases referred to

1 *Shamsuddin bin Hassan & Anor v PP* [1991] 3 MLJ 314 (folld)
I 2 *Abdullah bin Yaacob v PP* [1991] 2 MLJ 237 (folld)
3 *Abdul Jalil bin Abdul Satar v PP* [1991] 2 CLJ 1089 (folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(b), (d), (da), 39B(1)(a), (2)

Appeal from: Criminal Trial No 58–14–87 (High Court, Johore Bahru) A

Teh Poh Teik and *Hira Singh* (*Abdul Rahman Saad & Associates*) for the appellant.

Kang Hwee Gee (Deputy Public Prosecutor) for the respondent. B

Gunn Chit Tuan SCJ (delivering the judgment of the court): The appeal was against the conviction and sentence of the appellant under ss 39B(1)(a) and 39B(2) of the Dangerous Drugs Act 1952. The charge was that on 14 May 1986 at about 10.50am, at house No 54-B Jalan Perang, Taman Pelangi, Johore Bahru, the appellant was found with 23.71g of mixed C heroin and monoacetyl morphine and thereby raising the statutory presumption of trafficking under the Act.

The facts of the case are fairly straightforward. On the above-stated date and time, Insp Jasbir Singh (PW2) together with three police personnel raided a room at a house stated in the charge. The room was situated at the D rear portion of a flat in a three-storey shophouse. On entering the premises the police personnel proceeded straight to the room referred to in the sketch plan as room B. After knocking at the door the appellant opened the door and Insp Jasbir Singh also noticed a female person sleeping in the said room. This female person later became the second accused at the trial in the High Court. Insp Jasbir made a search in the room and found a vanity E case placed on top of a plastic cupboard. In this vanity case he found several make-up items and also ten plastic packets containing a substance suspected to be drugs. On a further search of the room the police found two black shoe boxes on the floor. In one shoe box one red plastic bag with 26 small plastic packets containing substances suspected to be drugs were F found and also 25 plastic packets containing substances suspected to be drugs. The other shoe box was found to contain candles, a spoon, a pen knife and 117 empty plastic bags. In the plastic cupboard in the room the police party recovered, among other things, a restricted passport in the name of the appellant. The substance suspected to be drugs was sent to the chemistry department and the chemist (PW5) certified that they were G 20.28g of heroin and 3.43g of monoacetyl morphine.

To cut the matter short, at the close of the prosecution case the trial judge found that the prosecution had proved a prima facie case against the appellant to invoke the presumption under s 37(b), which provides that a person, until the contrary is proved, shall be deemed to be the occupier of H any premises, if he has, or appears to have, the care or management of such premises. The learned judge held that the prosecution could invoke s 37(d) which provides that any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the I nature of such drug. [See [1991] 1 MLJ 226.]

As the amount of the drugs involved here was more than 15g the statutory presumption under s 37(da)(iiia) was also invoked. The trial judge, however, acquitted the second accused.

A It was also found by the learned judge that the second accused was the girlfriend of the appellant who visited the appellant occasionally at the flat. Insp Jasbir Singh also said in evidence that the identity card bearing the name of the second accused was found in the vanity case although this identity card was not tendered in court. On the day in question the second accused had spent the night with the appellant.

B In his defence the appellant denied knowledge of the drugs. He also denied he had exclusive use of the room since his other friends also frequented the room. The appellant stated that he rented room B at the same time as one Yoong Thien Soong who rented room A in the same premises. The appellant also named several other friends (Kenny, Ah Fun,

C Ah Tuan and Kucing) who frequented his room because he had an air-cooler and a mini-compo player in his room. These friends also frequented Yoong Thien Soong's room.

It is also in evidence and not challenged that the door knob with lock to room B of the appellant was spoilt and from the photograph (exh P2), the

D door knob in fact was already removed from the door when the appellant moved into room B.

It is also seen from the evidence that the cumulative effect of the evidence adduced would seem to show that the appellant had no exclusive use of room B. This aspect of the evidence would seem also to have troubled the learned judge and this is reflected in his grounds of judgment

E at p 228 where he said:

> Sad to say the investigation relating to the nature of the door to room B was lacking. No pictures were taken of the front side of the door nor were there detail descriptions from PW6 of the nature of the door and the manner it could be locked from the inside and outside of the room. This leaves all parties baffled and in search of evidence as to how the door could be locked from the outside from

F the testimonials of other witnesses. This is an important piece of information which was relied on by both prosecution and the defence.

At the latter part in his grounds of judgment the learned trial judge tried to justify his conclusion that 'exclusive right' must be viewed in the light of all circumstances of each particular case. He stressed [at p 230] that:

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> It does not mean that once the accused person tendered evidence that some of his friends entered the room with or without his permission it is sufficient evidence to say that the drugs found therein did not belong to the accused and that he has lost his exclusive use of the room.

H The totality of the evidence did not support the justification. Firstly, it is to be stressed that the burden on the appellant was merely to cast a reasonable doubt on the prosecution case. Where the presumption under s 37(da) is invoked the burden on the defence was only on the balance of probabilities.

The other aspect of the evidence in this case must be examined. It would seem that the learned trial judge did not consider the evidence that the said

I Yoong Thien Soong (tenant of room A) was also arrested at the same time with four packets of drugs found in the room. Although the learned judge recognized the evidence relating to the contention that the door to room B could not be locked with the key at the material time, yet he did not give sufficient consideration to that evidence. In fact contrary to the evidence,

the learned trial judge made a number of speculations to justify his conclusion, namely, that the padlock (exh P28) could be used to padlock room B, and that the appellant could have purchased another padlock and holding that the air-cooler and the mini-compo were valuable items and that the shoe boxes were meant for storage of drugs. In fact, the doubt as to exclusive use of room B by the appellant alone could be sufficient ground to allow the appeal.

However, there are other aspects of the evidence which are equally unsatisfactory. The most serious flaw in the prosecution case is the evidence relating to the exhibits. The first thing to note is that there was no evidence as to the weight of the ten packets of drugs found in the vanity case of the second accused. A reasonable conclusion must be that the vanity case must have belonged to her because Insp Jasbir Singh said that her identity card was found in it. Since the total weight of heroin and monoacetyl morphine in the charge was 23.71g, that is, only 8.71g above the statutory limit of s 37(da)(iiia), the weight of the ten packets of drugs in the vanity case is crucial to sustain the charge against the appellant. The second flaw in the prosecution evidence relating to the exhibits is the chain of evidence relating to the drugs from the time it was discovered up to the time they reached the chemist. There was no search list to assist the prosecution although reference was made to it by the investigating officer (PW6). ASP K Govinda (PW6) certified that he sealed three packages. P30 contained 12 packets, P5 contained 10 packets, P31 contained 25 packets and P32 contained 29 packets — totalling 76 packets.

On the number of packets of drugs involved in this case there are the following discrepancies in the evidence:

(1) PW2 (arresting officer) said he recovered a total of 61 packets, ie P13 — 26 packets, P14 — 25 packets and P5 — 10 packets;
(2) PW5 (chemist) said he received a total of 64 packets for analysis made up separately of 10 packets, 25 packets and 29 packets; and
(3) PW6 (investigating officer) said in examination-in-chief that there was a total of 76 packets made up of P30 — 12 packets, P5 — 10 packets, P31 — 25 packets and P32 — 29 packets.

Where there is a serious doubt as to the identity of the exhibit as clearly is the case here, it cannot be said that the prosecution has established a prima facie case under the charge (vide *Shamsuddin bin Hassan & Anor v PP*,[1] *Abdullah bin Yaacob v PP*,[2] *Abdul Jalil bin Abdul Satar v PP*[3]).

We accordingly allowed the appeal and set aside the conviction and sentence against the appellant.

Appeal allowed.

Reported by Prof Ahmad Ibrahim